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Nos. 78-882 and 78-885

In the Supreme Court of the United States

OCTOBER TERM, 1978

HUGO FREDERIC FORSTER, PETITIONER

v.

UNITED STATES OF AMERICA

MARGARITO O. ROMERO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B-1 to B-19)[1] is reported at 585 F. 2d 391. The opinion of the district court (Pet. App. A-1 to A-15) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 16, 1978. A petition for rehearing was denied on

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[1]All appendix references are to the appendix filed by petitioner Romero (No. 78-885).

November 3, 1978. The petitions for a writ of certiorari were filed on December 2, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the seizure pursuant to a federal warrant of documents that previously had been seized by state officials pursuant to an invalid state warrant violated the Fourth Amendment, where the facts supporting the federal warrant were obtained independently from the unlawful state seizure.

2. Whether petitioner Forster's Sixth Amendment right to a speedy trial was violated.

3. Whether the use of hearsay evidence in the grand jury proceedings invalidated petitioner Forster's subsequent indictment.

STATEMENT

Following a bench trial on stipulated facts and documentary evidence in the United States District Court for the Northern District of California, petitioners were convicted of transporting and conspiring to transport stolen goods in interstate commerce, in violation of 18 U.S.C. 2314 and 371.[2] Petitioners each received a one-year sentence of imprisonment to be followed by a five-year term of probation. In addition, petitioner Romero was fined $45,000 and petitioner Forster was fined $25,000. The court of appeals affirmed, one judge dissenting (Pet. App. B-1 to B-19).[3]

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[2]Petitioner Romero was convicted on eight substantive counts; petitioner Forster on five.

[3]On November 24, 1978, Mr. Justice Rehnquist denied petitioner Romero's application for a stay of the court of appeals' mandate (No. A-465), which raised the illegal search and seizure claim presented here.

The pertinent facts are set forth in the opinions of the district court (Pet. App. A-2 to A-4) and the court of appeals (Pet. App. B-2 to B-5). Between 1973 and 1975, federal and state law enforcement officers conducted both independent and cooperative investigations of R & F Metals, a metal processing business owned and operated by petitioners. The authorities suspected that petitioners' company was trading gold stolen from a mine located in Nevada. As a result of these investigations, South San Francisco police officers, acting pursuant to state search warrants, seized various business records from petitioners' premises on May 2 and June 17, 1975. Thereafter, federal agents were allowed to inspect the seized documents.[4]

Following their indictment on state charges in October 1975, petitioners moved to suppress the records seized by the police officers, claiming that the state search warrants contained an overbroad description of the items to be seized. In March 1976, the state trial judge granted petitioners' motion to suppress, thereby essentially terminating the state prosecution. Subsequently, the state judge ordered the prosecutor to return the seized documents to petitioners by April 28, 1976.

In the interim, however, on April 26, 1976, federal agents executed a series of search warrants covering petitioner Romero's home, petitioner Forster's office, and the office of the state prosecutor, where some of the documents seized in the earlier state search were still located. Both lower courts found that "[t]he federal warrants were supported by affidavits which contained no significant information which was not available to the FBI prior to the issuance * * * of the state warrants" and that "the evidence unlawfully seized by the state was not utlilized in the preparation of the federal affidavit or warrant" (Pet. App. B-4, B-7, A-6).

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[4]As the court below found, at the time that the federal agents examined these documents they had no reason to know that the documents had been seized unlawfully (Pet. App. B-3 & n.1).

ARGUMENT

1. Petitioners contend (Forster Pet. 19-22; Romero Pet. 7-14) that the federal seizure of their business records that were unlawfully in the possession of the state prosecutor violated the Fourth Amendment.[5] This claim is without merit for the reasons stated by the district court and the court of appeals, on whose opinions we rely. At the culmination of a substantial federal investigation, federal agents obtained petitioners' business records pursuant to a series of valid search warrants. Previously, state authorities had illegally seized these same records and, in fact, were still in possession of some of them at the time of the execution of the federal warrants. However, the federal warrants were not related to or derivative of the invalid state seizure (Pet. App. A-4 to A-6; B-4, B-7). Rather, as both lower courts found, the affidavits supporting the federal warrants reflected the federal agents' independent knowledge of petitioners' activities derived from their comprehensive investigation, which had been begun well before the seizure by state authorities. The affidavits did not contain any information known only as a result of the state seizure.[6]

[5]Petitioners apparently contest only the seizure of their business records still in the state's possession. They do not challenge the federal search of petitioner Romero's home or petitioner Forster's office.

[6]Although the state police had probable cause to search petitioner's premises, the state warrants were invalid because the descriptions of the items to be seized were overly broad. The subsequent federal warrants avoided this pitfall by specifying that the agents sought to seize documents concerning allegedly illicit business transactions between R & F Metals and certain enumerated firms. With one exception, these firm names had previously appeared in the affidavit supporting the invalid state warrant and were thus not discovered by means of the state search. (Indeed, the one exception was actually another name for one of the companies named in the state affidavit (Tr. 142)). Based on this fact and the testimony of various state and local officials, both courts below correctly concluded that the federal officials did not use or exploit the information unlawfully obtained by the state (Pet. App. A-5 to A-6, B-4, B-7). This concurrent factual finding does not warrant further review. See *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).

Petitioners primarily rely on this Court's decision in *Elkins* v. *United States*, 364 U.S. 206 (1960), a case that also involved the federal government's attempted use of evidence illegally seized by state agents. However, there is no suggestion in *Elkins* that the federal government had knowledge of the evidence from an independent source. Contrary to petitioners' contention that *Elkins* is nonetheless controlling, this Court has repeatedly stated that where, as here, the government obtains evidence without reliance on a prior violation of the Fourth Amendment, the independent source purges the taint of the illegal seizure. See, *e.g.*, *United States* v. *Ceccolini*, 435 U.S. 268, 274-275 (1978); *Wong Sun* v. *United States*, 371 U.S. 471 (1963). "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others * * *." *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, 392 (1920).[7]

[7]The dissenting judge in the court of appeals agreed that "the federal search warrants were founded on information obtained from sources independent of any tainted examination of the materials improperly seized by the state" (Pet. App. B-17). He believed, however, and petitioners now argue (Forster Pet. 22; Romero Pet. 8-9), that the federal seizure from the state authorities was somehow repugnant to the notion of federalism. But here the federal courts are neither undermining nor reviewing a state court exclusionary rule decision. Rather, accepting the state court's finding of illegality in the state seizure, the courts below merely examined the federal agents' independent knowledge of petitioners' activities. This knowledge was the basis of federal warrants that were not in question in the state court proceedings. Petitioners' federalism claim is further belied by the fact that the state judge not only made no objection to the federal seizure, but also even delayed the return of the papers until after the federal agents had executed their warrant (Pet. App. A-3, B-5).

Equally insubstantial is petitioner Romero's assertion (Pet. 12-14) that the decision of the court of appeals conflicts with *United States* v. *Paroutian*, 299 F. 2d 486 (2d Cir. 1962), and *United States* v. *Houltin*, 525 F. 2d 943 (5th Cir. 1976). Both of those cases involved evidence discovered as the direct result of the government's exploitation of a Fourth Amendment violation. For instance, in *Houltin* an illegal wiretap enabled government agents to follow and ultimately arrest the defendants, who were attempting to import large quantities of marijuana into this country. The Fifth Circuit refused to uphold the arrests at issue on the theory that the government agents would have inevitably discovered the defendants' whereabouts. *Id.* at 948-949. In contrast, here government agents had probable cause to seize petitioners' records independent of the prior illegal state search. Thus, without reference to a hypothetical independent source or the inevitable discovery doctrine,[8] the courts below correctly concluded that the business records were admissible at petitioners' federal trial. See, *e.g.*, *Costello* v. *United States*, 365 U.S. 265, 278-280 (1961); *United States* v. *Abascal*, 564 F. 2d 821, 829 (9th Cir. 1977), cert. denied, 435 U.S. 953 (1978); *United States* v. *Carino*, 417 F. 2d 117 (2d Cir. 1969).[9]

2. Petitioner Forster also argues (Pet. 23-26) that he was denied his Sixth Amendment right to a speedy trial.[10] The basis of this contention is that the federal prosecution should be deemed to have commenced with the prior

[8]See generally Note, *The Inevitable Discovery Exception to the Constitutional Exclusionary Rules*, 74 Colum. L. Rev. 88 (1974).

[9]In addition, we note that the other records of petitioners' business that had been returned by the state prosecutor prior to the execution of the federal warrants were nonetheless seized by federal agents at petitioner Romero's home and petitioner Forster's office. Petitioners do not contest the validity of those seizures. See note 5, *supra*.

[10]Petitioner concedes (Forster Pet. 25) that he failed to establish a due process violation arising out of the preindictment delay. See *United States* v. *Lovasco*, 431 U.S. 783 (1977).

initiation of the state proceedings, because the federal charges were similar to the state charges and the federal and state authorities cooperated in investigating petitioners' illicit activities. But, at least where the state criminal proceedings are not a mere pretext to restrain a defendant until such time as the federal authorities may decide to prosecute, a state arrest will not constitute the commencement of the federal prosecution for speedy trial purposes. See *United States* v. *Cordova*, 537 F. 2d 1073, 1075-1076 (9th Cir. 1976); *United States* v. *DeTienne*, 468 F. 2d 151, 155 (7th Cir. 1972), cert. denied, 410 U.S. 911 (1973); see also *United States* v. *Lai Ming Tanu*, No. 78-1255 (2d Cir. Nov. 17, 1978), slip op. 283-285; cf. *United States* v. *Cabral*, 475 F. 2d 715 (1st Cir. 1973).[11] Here, both courts below correctly concluded that the state arrest was not directed by or attributable to the federal authorities (Pet. App. A-12, B-14 to B-15). Rather, the federal prosecution commenced with petitioner's federal indictment, which was the result of an independent federal investigation that continued long after state officials had separately decided to prosecute petitioner (Pet. App. A-3).[12]

[11]In *United States* v. *Cabral*, *supra*, the court of appeals assumed that the federal prosecution commenced when state police arrested the defendant and three days later gave the federal authorities a sawed-off shotgun that had been seized from the defendant by a state officer. The court held, however, that regardless of when the speedy trial rights attached, the defendant suffered no prejudice requiring dismissal of the indictment. Moreover, unlike the instant case, state officials never pursued an independent prosecution of the defendant for violation of state gun laws. Finally, insofar as *Cabral* held that the defendant's Sixth Amendment rights attached when the state authorities turned over the gun to federal officers rather than when the federal authorities arrested or indicted the defendant, it is inconsistent with this Court's subsequent decision in *Dillingham* v. *United States*, 423 U.S. 64 (1975).

[12]Only four months elapsed between petitioners' federal indictment and trial. This delay, which was attributable in large part to petitioner's pretrial motions, is plainly insufficient to suggest a violation of petitioner's Sixth Amendment rights.

Moreover, even assuming that petitioner is correct that for speedy trial purposes the federal prosecution began with the state arrest, the courts below correctly rejected petitioner's Sixth Amendment claim. Petitioner was at large during both the state and federal proceedings and suffered no prejudice as a result of this 20-month delay (Pet. App. A-12 to A-13, B-15). And, much of the pretrial delay was attributable to petitioner's suppression motions. See *Barker* v. *Wingo*, 407 U.S. 514, 530-533 (1972); *United States* v. *Mejias*, 552 F. 2d 435, 442-443 (2d Cir.), cert. denied, 434 U.S. 847 (1977); *United States* v. *Cabral*, *supra*, 475 F. 2d at 719.

3. Finally, petitioner Forster contends (Pet. 26-28) that his indictment was based solely upon hearsay evidence and that the court of appeals' refusal to dismiss the indictment on this ground conflicts with *United States* v. *Estepa*, 471 F. 2d 1132, 1136-1137 (2d Cir. 1972). In *Estepa*, the Second Circuit held that an indictment could be dismissed under the court's supervisory powers where the grand jury had been misled as to the hearsay nature of the evidence presented or where there was "a high probability that with eyewitness rather than hearsay testimony the grand jury would not have indicted" (*id.* at 1137). But, as the district court found (Pet. App. A-13), the grand jury was not misled here since the FBI agent clearly explained that his testimony was based on interviews with various witnesses and a review of pertinent documents (see, *e.g.*, R. 243, 247, 249, 259).[13] Moreover, the Second Circuit has subsequently limited *Estepa* to the particular circumstances of that case. See *United States* v. *Marchand*, 564 F. 2d 983, 1001 n.29 (2d

[13]Petitioner concedes (Forster Pet. 27), as he must, that an indictment may be based entirely on hearsay evidence. See, *e.g.*, *United States* v. *Calandra*, 414 U.S. 338, 345 (1974); *Lawn* v. *United States*, 355 U.S. 339, 349 (1958); *Costello* v. *United States*, 350 U.S. 359, 363 (1956).

Cir. 1977), cert. denied, 434 U.S. 1015 (1978); *United States* v. *Harrington*, 490 F. 2d 487, 489 (2d Cir. 1973).[14]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[14]Similarly without merit is petitioner's speculative allegation that the evidence before the jury failed to establish probable cause as to all counts. See *United States* v. *Calandra*, 414 U.S. 338, 345 (1974) ("an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence * * *").

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